# Lim Ah Moi v AMS Periasamy a/l Suppiah Pillay

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO A-02-641 OF 1995
GOPAL SRI RAM, ABU MANSOR AND DENIS ONG JJCA
13 MAY 1997

***Land Law*** *— Restraints on dealings — Caveats — Caveatable interest — Rescission of sale and purchase agreement by purchaser — Whether purchaser, having made his election to rescind the agreement, had caveatable interest to caveat the land — National Land Code 1965 s 323*

***Land Law*** *— Restraints on dealings — Caveats — Application for removal of caveat — Whether claims made by caveator was made without undue delay — When time began to run — National Land Code 1965 s 327*

***Land Law*** *— Restraints on dealings — Caveats — Application for removal of caveat — Exercise of discretion of the court based on the justice of the case — Whether on the facts discretion was wrongly exercised — National Land Code 1965 s 327*

In 1983, the appellant and one Tan Hee Thai ('the vendor') entered into a sale and purchase agreement ('the agreement') in respect of a piece of land measuring 5.5 acres in Tapah ('the land') of which the respondent was the registered proprietor. A deposit ('the deposit') was paid. Soon thereafter, the appellant entered a caveat against the land.

On 31 July 1986, the vendor's solicitors wrote to the appellant's solicitors informing them that the area of the land available for transfer was not 5.5 acres as stated in the agreement but only 4.28 acres. On 8 August 1986, the appellant's solicitors wrote to the vendor that the appellant was not interested to take the 4.28 acres and demanded the refund of the deposit. The appellant also reserved his right to sue the vendor for breach of contract and claim damages. However, by 29 August 1986, the vendor intimated to the appellant that the former was again at a position to deliver to the appellant a valid and registrable transfer in respect of the sale of the 5.5 acres of land. The land however was subsequently sold to a third party.

On 28 April 1989, the appellant obtained an ex parte order extending the caveat pursuant to the provisions of s 326(2) of the National Land Code 1965 ('the Code'). Nothing else happened until 28 August 1995 when the appellant filed a writ for specific performance and ancillary relief. Consequently, the respondent, as registered proprietor, applied to remove the caveat.

The learned judge who heard the application directed the removal of the caveat on the grounds that: (i) the appellant had no caveatable interest in the land having given up his rights by electing to rescind the agreement by way of his letter dated 8 August 1986; and (ii) the appellant had not acted timeously in enforcing his claim by way of an action in court. The appellant appealed. The appellant argued, inter alia, that the delay was only a few months because time began to run

only after he discovered from a reading of the vendor's affidavit that the land had been resold to a third party. A

**Held**, dismissing the appeal:

(1) When the vendor's solicitors stated in their letter of 31 July 1986 their client's inability to convey 5.5 acres of the land to the appellant, there was a clear breach of the terms of the agreement. Once he received that intimation, the appellant had at least two alternatives open to him. An innocent party against whom a contract is repudiated may either accept the repudiation and sue for damages or he may treat the contract as continuing and sue for specific performance. B C

In the present case, the appellant clearly made his election to rescind the agreement. Hence his demand for the return of the deposit. What he was in fact asking was a restoration of the status quo ante. Having taken the stand that he did by his letter of 8 August 1986, he could not later detract. His claim, if any, was confined to the recovery of the deposit and not to the land he had agreed to purchase. The learned judge was therefore correct in holding that there was no caveatable interest within s 323 of the Code (see p 329E–I); *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 followed. D E

(2) It is well settled that a caveat acts as a statutory injunction which fetters a registered proprietor from dealing with his property and exercising all the rights conferred upon him by the Code. Because of its far-reaching effect, it is vital that claims made by a caveator are enforced by action without undue delay.

A reasonable man reading the appellant's letter of 8 August 1986 would be left with the impression that the appellant was no longer interested in the land and that the vendor was at liberty to dispose of it as he thought fit. Time should, therefore, be determined from 8 August 1986 and not the later date suggested by the appellant (see pp 330H–I and 331D–E); *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 and *Teo Ai Choo v Leong Sze Hian* [1982] 2 MLJ 12 followed. F G

(3) Whether a caveat ought to remain or be removed involves the exercise of discretion by the judge hearing an application under s 327 of the Code. Particular attention should be paid to the words 'may make such order on the application as it may think just' that appear in the section. These words make it clear that a court hearing an application to remove a caveat is very much concerned with the justice of the case. The process involves a balancing of competing considerations and an evaluation of the evidence and the facts of each particular case until the balance conclusively shifts in one direction or the other. On the facts, it was unconvincing that discretion was wrongly exercised by the judge in this case (see p 331F–G). H I

A **[Bahasa Malaysia summary**

Dalam tahun 1983, perayu dan seorang bernama Tan Hee Thai ('penjual') telah mengikat suatu perjanjian jual beli ('perjanjian tersebut') berhubung dengan sebidang tanah seluas 5.5 ekar di Tapah ('tanah tersebut') yang mana penentang merupakan tuan punya
B berdaftar. Suatu deposit ('deposit tersebut') telah dibayar. Tidak lama selepas itu, perayu memasukkan kaveat terhadap tanah tersebut.

Pada 31 Julai 1986, peguamcara penjual menulis kepada peguamcara perayu memaklumkan bahawa kawasan atas tanah tersebut yang boleh dipindahmilik bukanlah 5.5 ekar seperti yang dinyatakan dalam perjanjian tersebut tetapi cuma 4.28 ekar. Pada
C 8 Ogos 1986, peguamcara perayu menulis kepada penjual bahawa perayu tidak berminat mengambil 4.28 ekar itu dan menuntut pengembalian deposit tersebut. Perayu juga mengkhaskan haknya untuk mendakwa penjual atas kemungkiran kontrak dan menuntut ganti rugi. Walau bagaimanapun, pada 29 Ogos 1986, penjual
D memaklumkan kepada perayu bahawa penjual sekali lagi berada dalam kedudukan untuk menyerahhak pindahmilik yang sah dan boleh didaftar berhubung dengan jualan 5.5 ekar tanah kepada perayu. Namun demikian, tanah tersebut kemudiannya telah dijual kepada suatu pihak ketiga.

E Pada 28 April 1989, perayu memperolehi suatu perintah ex parte yang melanjutkan kaveat menurut peruntukan s 326(2) Kanun Tanah Negara 1965 ('Kanun tersebut'). Tiada apa lagi berlaku sehingga 28 Ogos 1995 apabila perayu memfailkan satu writ untuk pelaksanaan spesifik dan relief sampingan. Berikutnya, penentang, sebagai tuan
F punya berdaftar, membuat permohonan untuk membatalkan kaveat.

Hakim yang arif yang mendengar permohonan itu mengarahkan supaya kaveat dibatalkan atas alasan bahawa: (i) perayu tidak mempunyai kepentingan dalam tanah tersebut setelah menyerahkan haknya dengan memilih untuk membatal perjanjian tersebut melalui surat bertarikh 8 Ogos 1986; dan (ii) perayu tidak bertindak menepati
G masa dalam menguatkuasakan tuntutannya menerusi tindakan di mahkamah. Perayu membuat rayuan. Perayu berhujah, antara lain, bahawa kelewatan hanyalah sekadar beberapa bulan kerana masa cuma bermula selepas dia mendapati dari bacaan afidavit penjual bahawa tanah tersebut telah dijualkan semula kepada pihak ketiga.

H

**Diputuskan**, menolak rayuan:

(1) Apabila peguamcara penjual menyatakan ketidakupayaan klien mereka untuk menyerah 5.5 ekar tanah tersebut kepada perayu dalam surat bertarikh 31 Julai 1986, terdapat suatu kemungkiran
I yang jelas atas terma perjanjian tersebut. Selepas menerima makluman itu, perayu mempunyai sekurang-kurangnya dua alternatif yang terbuka kepadanya. Pihak yang ikhlas yang mana suatu kontrak ditolak boleh menerima penolakan itu dan membuat

dakwaan untuk ganti rugi atau dia boleh menganggap kontrak itu berterusan dan membuat dakwaan untuk pelaksanaan spesifik. A

Dalam kes ini, perayu jelasnya telah membuat pilihan untuk membatalkan perjanjian tersebut. Justeru itu tuntutannya untuk pengembalian deposit tersebut. Pada hakikatnya, apa yang diminta adalah pengembalian status quo ante. Selepas mengambil pendirian yang diambilnya menerusi surat bertarikh 8 Ogos 1986, dia tidak boleh menarik diri. Tuntutannya, jika ada, adalah terhad kepada pengembalian deposit tersebut dan bukan kepada tanah yang dia bersetuju membeli. Oleh itu, hakim yang arif adalah betul dalam memutuskan bahawa tiada kepentingan boleh kaveat dalam s 323 Kanun tersebut (lihat ms 329E–I); *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 diikut. B C

(2) Adalah mantap bahawa kaveat bertindak sebagai suatu injunksi statutori yang membelenggu tuan punya berdaftar daripada menguruskan hartanya dan melaksanakan segala hak yang dianugerahkan kepadanya oleh Kanun tersebut. Disebabkan kesan yang meluas, adalah amat penting bahawa tuntutan yang dibuat oleh seorang pengkaveat dikuatkuasakan melalui tindakan tanpa kelewatan yang terlampau. D

Seseorang yang munasabah yang membaca surat perayu bertarikh 8 Ogos 1986 akan ditinggalkan dengan tanggapan bahawa perayu tidak lagi berminat dalam tanah tersebut dan bahawa penjual adalah bebas untuk melupuskannya sepertimana yang difikirkannya wajar. Oleh yang demikian, masa haruslah ditentukan dari 8 Ogos 1986 dan bukan tarikh kemudian yang dicadangkan oleh perayu (lihat ms 330A–H dan 331D–E); *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 dan *Teo Ai Choo v Leong Sze Hian* [1982] 2 MLJ 12 diikut. E F

(3) Sama ada sesuatu kaveat patut dibiarkan atau dibatalkan melibatkan pelaksanaan budi bicara oleh hakim yang mendengar permohonan di bawah s 327 Kanun tersebut. Perhatian khusus harus diberikan kepada perkataan-perkataan 'bolehlah membuat apa-apa perintah atas permohonan itu sepertimana yang difikirkannya adil' yang muncul dalam seksyen tersebut. Perkataan-perkataan ini menetapkan dengan jelas bahawa sesebuah mahkamah yang mendengar permohonan untuk membatalkan kaveat sangat mementingkan keadilan kes. Proses itu melibatkan imbangan pertimbangan yang menyaing dan penilaian keterangan dan fakta setiap kes tertentu sehingga imbangan mengalih secara muktamad dalam satu arah atau sebaliknya. Atas fakta-fakta, adalah tidak meyakinkan bahawa budi bicara telah dilaksanakan dengan salahnya oleh hakim dalam kes ini (lihat ms 331F–G).] G H I

**Notes**

For cases on caveats, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2241–2419.

**Cases referred to**

*Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 (folld)
*Sargent v ASL Developments Ltd* (1974) 131 CLR 634 (folld)
*Teo Ai Choo v Leong Sze Hian* [1982] 2 MLJ 12 (folld)

**Legislation referred to**

Contracts Act 1950 s 40
National Land Code 1965 ss 323, 326(2), 327

**Appeal from**: Originating Summons No 24–358 of 1989 (High Court, Ipoh)

*Gurubachan Singh* (*Bachan & Kartar*) for the appellant.
*V Vijaya Segeran* (*Maxwell Kenion Cowdy & Jones*) for the respondent.

*Cur Adv Vult*

**Gopal Sri Ram JCA** (delivering oral judgment): As long ago as February 1983, the appellant and one Tan Hee Thai entered into a sale and purchase agreement in respect of a piece of land in Tapah of which the respondent is the registered proprietor. Soon after the execution of this agreement on 8 June 1984, the appellant entered a caveat against the title to the land to protect his interest pending completion. It is what the profession calls a 'conveyancing caveat'. Such a caveat is entered, not in anticipation of any litigation, but merely pending conveyance and transfer of the property which forms the subject matter of the sale.

On 31 July 1986, the vendor, Tan Hee Thai, through his solicitors, wrote to the appellant's solicitors informing them that the area of the land available for transfer was not 5.5 acres as stated in the sale and purchase agreement but only 4.28 acres. The appellant took exception to this information. On 8 August 1986, his solicitors responded by a letter the contents of which are so important that I consider their reproduction here vital. This is what the letter says:

> Messrs AS Yeo & Co
> Advocates and Solicitors
> No 9, Jalan Bandar Raya
> (Jalan Hale)
> 30000 Ipoh.
>
> Dear Sirs,
>
> Re: Tapah Estate HS (D) BP 56/81 Lot 6399 in the Mukim District of Batang Padang
>
> We refer to your letter dated 31 July 1986.
>
> Our client has instructed us to inform you that he expressly by the agreement purchased a piece of land measuring 5.5 acres. Our client needs for his purposes a minimum of 5.5 acres and not 4.28 acres as now offered by your clients in clear breach of the agreement. As the other piece of 1.22 acres is in a different lot, our client is definitely not agreeable to take two

pieces in different lots. As stated, our client agreed to purchase 5.5 acres and not 4.28 acres in one lot and 1.22 acres in another.

As regards your para 4, we are of the view that a reduction of 1.22 acres is a very substantial reduction and a piece of 4.28 acres will not serve our client's purpose for which the land was purchased.

As such our client is not interested to take the 4.28 acres offered by your client in breach of the agreement and there is no question at all of your client forfeiting the RM10,000. Instead, our client reserves the right to sue your client for breach of contract and claim damages.

As instructed, we hereby demand the refund of the sum of RM10,000 together with interest at the rate of 12% per annum from the date of receipt of the said sum by your client till realization.

Your client is to take this as notice that if the said sum together with interest is not refunded within 14 days from date hereof we have instructions to commence legal proceedings against your client without any further reference.

On 29 August 1986, the vendor's solicitors replied as follows:

Messrs Bachan & Kartar
Advocates and Solicitors
2nd Floor
31, Station Road
30000 Ipoh

Dear Sirs,

Re: Tapah Estate HS (D) BP 56/81 Lot 6399 in the Mukim District of Batang Padang

We acknowledge receipt of your letter of 8th instant, contents of which have been conveyed to our client.

We are pleased to inform you that our client has completed arrangements with AMS Periasamy s/o Suppiah Pillay to transfer direct to you the 5.5 acres of land which they have agreed to sell to you under the relevant agreement of sale and purchase.

In view of this, our client is now in a position to deliver to your client a valid and registrable transfer in respect of the sale to your client of the 5.5 acres of land.

Our client now instructs us to and we do hereby give you notice to pay up to us as solicitors for our client the balance of the purchase price which has been deposited by your client to you since 3 August 1983. If your client fails to pay up the balance of the purchase price within fourteen (14) days of the receipt of this letter, our client will have no alternative but to forfeit the deposit of RM10,000 paid under the relevant agreement of sale and purchase.

Upon receipt of this sum, we undertake to deliver to you the title deed and a valid and registrable transfer for execution by your client.

On 28 April 1989, the appellant obtained an ex parte order extending the caveat pursuant to the provisions of s 326(2) of the National Land Code 1965 ('the Code'). Nothing else happened until 28 August 1995 when the appellant filed a writ for specific performance and ancillary relief.

A On 29 September 1995, the respondent, as registered proprietor, applied to remove the caveat. On 30 August 1996, the learned judge who heard the application made an order in terms of it and directed the removal of the caveat.

His reasons appear sufficiently in his written judgment and may be B summarized as follows:

(1) the appellant had no caveatable interest in the land having given up his rights by electing to rescind the sale and purchase agreement by way of his letter dated 8 August 1986; and

(2) the appellant had not acted timeously in enforcing his claim by way C of an action in court.

I will take each of these grounds, and the arguments addressed in respect of each of them, separately.

At the heart of this appeal lies the question, whether the appellant has a claim to the title of the land in question. The learned judge answered D this question against the appellant. He held that the effect of the appellant's letter of 8 August 1986 was an unequivocal abandonment of any interest in the land. Having read that letter very carefully, I must express my agreement with the conclusion reached by the learned judge on the point.

When the vendor's solicitors stated in their letter of 31 July 1986 E their client's inability to convey 5.5 acres of the land to the appellant, there was a clear breach of the terms of the sale and purchase agreement. Once he received that intimation, the appellant had at least two alternatives open to him. These alternatives appear in s 40 of the Contracts Act 1950 which is in the following terms:

F > When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

The other way of stating the rule is this. An innocent party against whom G a contract is repudiated may either accept the repudiation and sue for damages or he may treat the contract as continuing and sue for specific performance.

There is, in my judgment, yet a third option available to the innocent party. It is the common law right of rescission, akin to but much narrower than its equitable counterpart. In the present case the appellant clearly H made his election to rescind the sale and purchase agreement. Hence his demand for the return of the RM10,000. What he was in fact asking was a restoration of the status quo ante.

Having made this choice, he is bound by it. That much is clear from the judgment of Mason J (later CJ Australia) in *Sargent v ASL Developments* I *Ltd* (1974) 131 CLR 634 at p 655 where he said:

> It will make for greater certainty, therefore, if the present cases are regarded as cases of election. A person is said to have a right of election when events occur which enable him to exercise alternative and inconsistent rights, ie

when he has the right to determine an estate or terminate a contract for breach of covenant or contract and the alternative right to insist on the continuation of the estate or the performance of the contract. It matters not whether the right to terminate the contract is conferred by the contract or arises at common law for fundamental breach — in each instance the alternative right to insist on performance creates a right of election.

Essential to the making of an election is communication to the party affected by words or conduct of the choice thereby made and it is accepted that once an election is made, it cannot be retracted (*R v Paulson* [1921] 1 AC 271 at p 284; *Tropical Traders Ltd v Goonan* [1964] 111 CLR 41 at p 55). No doubt this rule has been adopted in the interests of certainty and because it has been thought to be fair as between the parties that the person affected is entitled to know where he stands and that the person electing should not have the opportunity of changing his election and subjecting his adversary to different obligations.

Later, his Honour said (at p 658):

For my part this proposition correctly states the law in its application to contracts as well as interests in property. If a party to a contract, aware of a breach going to the root of the contract, or of other circumstances entitling him to terminate the contract, though unaware of the existence of the right to terminate the contract, exercises rights under the contract, he must be held to have made a binding election to affirm. Such conduct is justifiable only on the footing that an election has been made to affirm the contract; the conduct is adverse to the other party and may therefore be considered unequivocal in its effect. The justification for imputing to the affirming party a binding election in these circumstances, though he be unaware of his alternative right, is that, having a knowledge of the facts sufficient to alert him to the possibility of the existence of his alternative right, he has acted adversely to the other party and that, by so doing, he has induced the other party to believe that performance of the contract is insisted upon. It is with these considerations in mind that the law attributes to the party the making of a choice, though he be ignorant of his alternative right. For reasons stated earlier, the affirming party cannot be permitted to change his position once he has elected.

In my judgment, the principles stated by Mason J apply with full force to the appellant's case. Having taken the stand that he did by his letter of 8 August 1986 he now cannot detract. His claim, if any, is confined to the recovery of the deposit he had paid and not to the land he had agreed to purchase. The learned judge was therefore quite right in holding that there was no caveatable interest within s 323 of the Code.

With that, I now turn to the second ground.

It is well settled that a caveat acts as a statutory injunction which fetters a registered proprietor from dealing with his property and exercising all the rights conferred upon him by the Code. Because of its far-reaching effect, it is vital that claims made by a caveator are enforced by action without undue delay.

Lord Diplock in *Eng Mee Yong & Ors v Letchumanan* [1979] 2 MLJ 212 at p 215 put the matter in this way:

> ... once the caveatee has met the first requirement of satisfying the court that the claim on which his caveat is based does raise a serious question to be tried, the balance of convenience would in the normal way and in the absence of any special circumstances be in favour of leaving the caveat in existence *until proceedings, brought and prosecuted timeously by the caveator, for specific performance of the contract of sale which he alleges had been tried.* (Emphasis added).

An illustration of the application of this principle is to be found in the case of *Teo Ai Choo v Leong Sze Hian* [1982] 2 MLJ 12 where Sinnathuray J directed the removal of a caveat because of a delay of 11 months during which period no action had been filed. I emphasize the fact that delay was the sole reason for the removal of caveat in that case.

Mr Bachan Singh has argued that the delay in the present case was only a few months because time began to run only after his client discovered from a reading of the vendor's affidavit in the present case that the land had been resold to a third party. With respect, I am unable to agree with counsel. Once the vendor had signified on 31 July 1986 that he was not in a position to honour the agreement, the appellant's rights crystallized in the sense of the election he was entitled to make. A reasonable man reading the appellant's letter of 8 August 1986, to which reference has already been made, would be left with the impression that the appellant was no longer interested in the land and that the vendor was at liberty to dispose of it as he thought fit. Time should, therefore, be determined from 8 August 1986 and not the later date suggested by counsel.

Whether a caveat ought to remain or ought to be removed involves the exercise of discretion by the judge hearing an application under s 327 of the Code. Particular attention should be paid to the words 'may make such order on the application as it may think just' that appear in the section. These words make it clear that a court hearing an application to remove a caveat is very much concerned with the justice of the case. The process involves a balancing of competing considerations and an evaluation of the evidence and the facts of each particular case until the balance conclusively shifts in one direction or the other.

After hearing the appellant's argument, I am left unconvinced that discretion was wrongly exercised by the judge in this case. In all appeals against exercise of discretion, the initial role of this court is one of review only. The burden lies upon the appellant to demonstrate convincingly that the judge to whom the law entrusts the primary exercise of the discretion has erred in principle or has taken into account or failed to take into account relevant considerations or has asked himself the wrong question.

This burden, the appellant before us, has, in my judgment, failed to discharge. This court has therefore no independent discretion to exercise. Even if I, sitting as the trial judge may have exercised discretion differently than has been done in the present instance, yet I will not be entitled to intervene. But, as it happens, in the present case, I am entirely satisfied the learned judge correctly exercised his discretion.

For these reasons, I would dismiss the appeal with costs and affirm the order of the learned judge.

**Abu Mansor JCA**: I agree with the judgment of my learned brother Gopal Sri Ram JCA. For the reasons given by him, I too would dismiss this appeal.

**Denis Ong JCA**: I concur and have nothing to add.

*Appeal dismissed.*

Reported by Loo Lai Mee